

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

Docket No.

74-2170

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

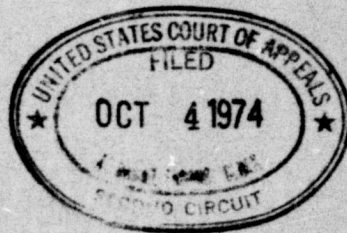
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UNITED STATES OF AMERICA

-against-

JAMES MITCHELL,

Appellant.
-----X

BRIEF ON BEHALF OF THE APPELLANT



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TABLE OF CONTENTS

Table of Cases.....	11.
Table of Statutes and Other Authorities.....	vi.
Statement of the Issues Presented for Review.....	1
Statement of the Case.....	2
Nature of the Argument.....	4
Point I.....	5
Point II.....	20
Point III.....	34
Point IV.....	39
Point V.....	43
Conclusion.....	46

INDEXAUTHORITIES CITED

Andrews v. Knowlton. 367 F. Supp. 1263 (S.D.N.Y. 1973).....	42
Baker v. F & F Investment Co., 470 F.2d 778, 785 (2d Cir. 1972).....	43,44
Blachmer v. United States, 284 U.S. 421 (1932).....	45
Bollenbach v. United States, 326 U.S. 607. 614 (1946).....	38
Branzberg v. Hayes, 408 U.S. 665 (1971).....	46
Matter of Brommer, 159 Misc. 511, 288 N.Y.S. 419 (Surr. Ct. 1936).....	36
Bruce v. United States. 379 F.2d 113, 116-117 (4th Cir. 1967).....	13
Campbell v. United States. 377 F.2d 135 (4th Cir. 1966).....	13,14
Candler v. United States, 146 F.2d 424,426 (5th Cir. 1944).....	29
Crawford v. Bounds. 395 F.2d 297 (4th Cir.1968).....	35
Davis v. United States, 328 U.S. 582. 593-94 (1946).....	21
Gibson v. Von Glahn Hotel Co., 185 N.Y.S. 154 (Sup. Ct. 1920).....	35,36
Gilmery v. Higley, 110 U.S. 47.....	38
H. J. Moravec, Sr., 3 T.C.M. 601, Dec. 30, 828(M) T.C. Memo 1971-140.....	18
Hayes v. United States, 227 F.2d 540 (10th Cir. 1955).....	11,16
Holt v. United States, 218 U.S. 245.....	20

Jackson v. United States, 371 F.2d 960 (C.A. D.C. 1966).....	14
Marshall v. United States, 436 F.2d 155 (4th Cir. 1970).....	8
Mathis v. United States, 391 U.S. 1(1968).....	39
Mesarosh v. United States, 352 U.S. 1, 9 (1956)...	21
Miller v. United States, 120 F.2d 969, 970 (10th Cir. 1941).....	12
Miranda v. Arizona, 384 U.S. 436.....	39
NAACP v. Button, 371 U.S. 415 (1963).....	43
Orozco v. Texas, 394 U.S. 324 (1969).....	41
People v. Cooper, 398 Ill. 468, 75 N.E. 2d 885 (1947).....	37
People v. Hoffman, 379 Ill. 318, 40 N.E.2d 515 (1941).....	34
People v. McGeoghegan, 325 Ill. 337, 156 N.E. 378 (1927).....	37
People v. Rivers, 410 Ill. 410, 102 N.E. 2d 303 (1951).....	34, 37
People v. Thunberg, 412 Ill. 565, 107 N.E.2d 843.....	37
People v. Wallenberg, 24 Ill. 2d 350, 181 N.E. 2d 143 (1962).....	36
People v. Wolf, 39 A.D. 2d 864, 333 N.Y.S. 2d 299 (1st Dept. 1972).....	44
Petesen v. United States, 268 F.2d 87, 89 (10th Cir. 1959).....	12
Pitts v. United States, 263 F.2d 808 (9th Cir. 1959) Cert. Den. 360 U.S. 919.....	5
Reilly v. Wallace, 188 Ky. 471, 222 S.W. 1085 (1920).....	35, 36

State v. Armitage, 167 La. 70, 118 So. 696 (1928).....	35
United States v. Abel, 258 F.2d 485, 494 (2d Cir.), aff'd 362 U.S. 217 (1958).....	21
United States ex re Bloeth v. Denno. 313 F.2d 364 (2d Cir.) cert. denied Denno v. Bloeth, 372 U.S. 978 (1963).....	35
United States v. Brown, 476 F.2d 933 (4th Cir. 1973).....	7
United States v. DeCoster, 487 F.2d 1197, 1201 (4th Cir. 1973).....	9, 17
United States v. Ellicott, 336 F.2d 868, 871 (4th Cir. 1964).....	21
United States v. MacLeod, 436 F.2d 947 (8th Cir.) cert. denied, 402 U.S. 907 (1971).....	26, 30
United States v. Matosky, 421 F.2d 410 (7th Cir. 1970) cert. denied 398 U.S. 904.....	10
United States v. Meyer, 462 F. 2d 827 on remand 346 F.Supp. 973 (4th Cir.1972).....	35
United States v. Palermo, 259 F.2d 872,881 (3rd Cir. 1958).....	30
United States v. Pope, 415 F.2d 685 (8th Cir. 1969).....	5
United States v. Schechter, 475 F.2d 1099, 1101 (5th Cir. 1973).....	21
United States v. Schiapani, 362 F.2d 825 (2d Cir.) cert. denied 385 U.S. 934 (1966)....	27
United States v. Thompson, 475 F.2d 931 (4th Cir. 1973).....	8,13,16
Wade v. United States, 388 U.S. 218, 227 (1967)....	9
Wilson v. United States, 250 F.2d 312 (9th Cir. 1950).....	31, 38

Wolfson v. Palmieri, 396 F.2d 121
(2d Cir. 1968)..... 35

INDEXTABLE OF STATUTES AND SECONDARY AUTHORITY

Int. Rev. Code of 1954, Section 7201 (1970).....	20, 16
Int. Rev. Code of 1954, Section 7203 (1970).....	20
Fed. R. Crim. P. 33.....	5, 6
N.Y. Civil Rights Law, Section 79-h (McKinney's Supp. 1973).....	45
<u>Secondary Authority</u>	
McCormick, Evidence, 330 (2d ed. 1972).....	41

STATEMENT OF THE ISSUES PRESENTED
FOR REVIEW

- POINT I. Was it an abuse of discretion for the Hon. Richard Owen to deny in its entirety the motion for a new trial pursuant to 18 U.S.C. 22?
- POINT II. Did the government sustain their burden of proving Mitchell's guilt beyond a reasonable doubt?
- POINT III. Did the Trial Judge rely upon information obtained through extrajudicial sources in rendering his verdict and determining Mitchell's sentence?
- POINT IV. Were the policeman and Internal Revenue agent who interrogated James Mitchell under a constitutional duty to warn the accused of his Miranda rights?
- POINT V. Was it a violation of Mitchell's First Amendment right to permit the testimony of Susan Hall?

CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

-against-

JAMES MITCHELL,

Appellant.

-----X

BRIEF SUBMITTED ON BEHALF OF THE APPELLANT

STATEMENT OF FACTS

The within appellant, JAMES MITCHELL, was indicted and charged with violating 18 U.S.C. 7201 and 18 U.S.C. 7203,

On July 1, 2 and 3, 1974 he was tried before the Hon. Richard Owen, without a jury. After the conclusion of the trial, Judge Owen reserved decision, and subsequently held Mitchell guilty on both counts.

Sentencing was originally scheduled for August 22, 1974. However, prior to this, for reasons more specifically set forth hereinafter, MITCHELL sought and retained new counsel to represent him.

After reviewing the facts, this office submitted an order to show cause, granted on the 22nd day of August, 1974 by the Hon. Richard Howen, and returnable on August 29, 1974 which sought the relief of a new trial or collateral hearing

to determine whether a new trial should be granted, pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The basis of this claim, as presented in the original application (order to show cause and reply memorandum of law in support of Rule 33 application) was based upon a claim of ineffective counsel. In addition, the sentencing of Mitchell was adjourned until August 29, 1974, the aforementioned return date of the order to show cause.

After reading a reply memorandum submitted in support of the Rule 33 application, and hearing oral argument from both sides, Judge Owen denied the application in its entirety (p.545 Transcript) and proceeded to sentence MITCHELL to three years confinement, with a \$10,000 fine on the first count, and a second one year sentence to run concurrently with the first, in addition to a second fine of \$10,000, and the costs of prosecution.

He was subsequently remanded to prison, where he currently is incarcerated, in Allenwood Federal Penitentiary.

A Notice of Appeal was filed on September 3, 1974.

An application for bail, pending the final determination of the within appeal was denied on September 10, 1974.

This appeal, which consists of two distinct parts, has followed. The first part contends that the denial of the Rule 33 application by the Hon. Richard Owen was an abuse of discretion, and constituted reversible error. The second aspect of the appeal concerns the actual proceedings of the trial itself.

NATURE OF THE ARGUMENT

It is submitted that the within appellant, JAMES MITCHELL, was tried and convicted of being a pimp. The use of the Internal Revenue Service was merely the means to this end.

Nevertheless, the role of the court is not to enforce a moral code, but to insure and guarantee that the constitutional safeguards of an accused are protected.

The overzealousness of the authorities to rid this world of the evils they see fit, can in no way or manner alter the established judicial safeguards for protecting the rights of defendants. The use of the courts to eradicate social evil through indirect means serves merely to demean the role the court has played as an impartial administrator of justice.

As will be conclusively demonstrated herein, the nature of the evidence admitted, the acceptance of certain testimony of witnesses, and the consideration of extrajudicially obtained information by the trial judge was of such a nature as to deny JAMES MITCHELL of his right to a fair trial.

POINT I.

THE DENIAL OF THE RELIEF SOUGHT IN THE
RULE 33 PROCEEDING WAS REVERSIBLE ERROR

It is well established that there must be present five verities before a new trial based upon newly discovered evidence may be granted pursuant to F.R.C.P. 33, 18 U.S.C.:

1. The evidence must be in fact newly discovered, that is, discovered since the trial;
2. Facts must be alleged from which the court may infer diligence on the part of the movant;
3. The evidence relied upon must not be merely cumulative or impeaching;
4. It must be material to the issues involved; and
5. It (the new evidence) must be of such nature that on a new trial, the newly discovered evidence would probably produce an acquittal.

United States v. Pope, 415 F.2d 685 (8th Cir. 1969),
Pitts v. United States, 263 F.2d 808 (9th Cir. 1959) cert. den.
360 U.S. 919.

Because the new evidence discovered by the defendant-petitioner herein clearly meets the standards established in Page and Pitts, supra, the decision of the District Court, the Honorable Richard Owen presiding, denying to the petitioner herein a new trial or in the alternative a collateral hearing to examine the new discovery was a clear abuse of discretion

and in the interests of justice must be reversed.

The reversible error of the Hon. Richard Owen consisted of misinterpreting the thrust of the taxpayer's claim. The Rule 33 proceeding was based upon a claim of ineffective counsel. After setting forth the necessary criteria for a proper application, Judge Owen, denied the application. (p 545 T) His reasons for denying the relief, conclusively demonstrate that Judge Owen, misinterpreted the claim of the taxpayer. On p 545 T Justice Owen held

Now, applying those standards, I do not find that they are met. The evidence was available to the defendant both before and during the trial and was not newly discovered.

The fact that this evidence was available and was not presented is the precise claim upon which the taxpayer relies to prove his claim of ineffective counsel. The reason this evidence was not presented was because the taxpayer's trial counsel, was not acting with his client's best interests in mind but rather was acting to prevent the disclosure of an associate's, William Werner, Esq., prior negligent and careless manner of handling the taxpayer's affairs before the Internal Revenue Service.

To simplify this matter even further, the categorization of the facts of this application into the five distinct requirements of 18 U.S.C. 33 will demonstrate that the denial of Hon. Richard Owen, of the application was such an abuse of

discretion, that it must be reversed as a matter of law and fact.

I. THE EVIDENCE WAS NEWLY DISCOVERED

The affidavits of petitioner Mitchell and Susan Hall which were submitted to the district court in support of the motion for a new trial clearly established that due to the nature of the newly discovered evidence itself, to wit, the claim of ineffective counsel, such a discovery could not be made until the conclusion of the original trial. Indeed there would be no means of measuring the performance of trial counsel until the trial had come to an end. This concept is one which has already been established in law.

In the case of United States v. Brown, 476 F.2d 933 (4th Cir. 1973) this particular point was made clear in the court's discussion of the allegations of ineffective counsel as newly discovered evidence. The court stated that,

"Where evidence of the ineffectiveness of trial counsel is brought to the attention of the court for the first time in support of the motion, that evidence is newly discovered for the purposes of Rule 33. Id at 935".

II. PETITIONER FULFILLED THE DUE DILIGENCE REQUIREMENTS OF RULE 33

Upon his conviction, the taxpayer immediately set out to retain new counsel whose sole purpose would be to rectify the wrongs perpetrated upon him during the course of the trial. It was obvious almost immediately that if the allegations of the petitioner about his involvement with the

two law firms Bandler and Kass and Golub and Pravda proved true, that the taxpayer herein had indeed suffered a gross injustice.

An investigation into the allegations seemed to bear out the taxpayer's version of the facts. Once this office's investigation was complete, a motion for a new trial was timely filed under the two year provision of Rule 33 F.R.C.P. Surely no one can fault the petitioner for the course of action he so diligently followed. In fact there was no other alternative open to him.

Prior cases have firmly established that the taxpayer's conduct herein was in fact diligent. In one case where the motion for a new trial was made on the grounds of newly discovered evidence and where that evidence was the alleged ineffectiveness of counsel, the court stated that the defendant,

"may raise more fully to support (that) claim... on a motion for a new trial without ~~excusing~~.... (his) action with a showing of earlier "due diligence". United States v. Thompson, 475 F.2d 931, 932 (4th Cir. 1973), and accord, Marshall v. United States, 436 F.2d 155 (4th cir. 1970).

III. THE NEW EVIDENCE WAS NOT CUMULATIVE OR IMPEACHING

Unlike other categories of newly discovered evidence which are often claimed as a basis of a motion for a new trial, evidence of the ineffectiveness of trial counsel cannot usually fall subject to the defect of being cumulative or impeaching. The primary reason for this result is that as in most similar

cases no evidence of the facts underlying the claim were ever produced at the trial by either the prosecution or the defense.

IV. THE NEWLY DISCOVERED EVIDENCE IS MATERIAL TO THE ISSUES INVOLVED HEREIN

It is submitted that as a matter of established case law a new trial must be granted where the incompetence, negligence, or personal interests of an accused's attorney are so great as to prejudice the accused and to prevent him from fairly presenting his defense. Indeed, at issue here are the fundamental rights guaranteed to all citizens by the Fourteenth and Sixth Amendments to the constitution. See Wade v. United States, 388 U.S. 218, 227 (1967). In the very least the defendant James Mitchell was "entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate". United States v. DeCoster, 487 F.2d 1197, (4th Cir. 1973). There can be no question but that the behavior of the defendant's trial counsel has deprived the petitioner of this fundamental right.

Common to both counts of the indictment of the petitioner is the requirement that the government prove a criminal intent on the part of the petitioner to defraud the United States. The government had the burden of establishing beyond a reasonable doubt that the petitioner never intended to pay his taxes or to file a return. The government had to show that petitioner's conduct was "willful" in the sense that it was "purposeful, deliberate and intentional". United States v.

Matosky 421 F.2d 410 (7th Cir. 1970) cert. denied 398 U.S. 904. It is contended that petitioner did not have the requisite willful intent as described herein and could not therefore be guilty of the crimes for which he was indicted as a matter of law. Petitioner's affidavits submitted to the trial court in combination with the affidavit of Susan Hall with whom he was associated throughout the entire 1971-73 period conclusively demonstrates that had the defendant's trial counsel not been so personally entwined with the facts surrounding this case that a proper defense could have been established.

The facts of this case as established in the trial court and in the affidavit of the petitioner show that Mitchell had, as early as December of 1971, and certainly no later than July of 1972, retained counsel to organize his business dealings and to handle the payment of any taxes, if indeed any were due. (Affidavit of Mitchell in support of Rule 33 application)

Additional tax help was summoned in the person of William Werner, Esq., an associate of Bandler and Kass in May of 1973 in order to finally settle any residual tax problem which the defendant might have had. Id. at 3. Certainly there exists on the part of the defendant direct evidence of his good faith and sincere intentions to resolve the problems surrounding his financial affairs. Certainly these efforts on the part of the taxpayer to seek professional advice on these particular matters go directly towards mitigating the criminal intent required for

a conviction under the relevant statutes. The utter failure of the taxpayer's trial counsel to establish the aforementioned matters in court was clearly due to his own intentional or negligent mis-management of the case which prejudiced the defendant beyond repair, for the sake of protecting another attorney.

There were literally innumerable avenues open to taxpayer's attorney to establish his client's good faith in this case. It has been held that an offer of payment is admissible in a tax evasion case to support the contention that there was no attempt to evade payment. Hayes v. United States, 227 F.2d 540 (10th Cir. 1955). In determining the questions of good faith the court held that,

Payment may be made or offered to be made under such circumstances as to warrant an inference of good faith and lack (of)... any intent to evade the payment of taxes... Id. at 543.

Indeed the taxpayer's continued efforts to seek professional help in order to settle his tax problems falls directly into the scheme contemplated in Hayes, supra.

Even though trial counsel's strategy may have included the desire to help the defendant from testifying see Record at 547, such a strategy would be no justification for entirely ignoring the establishment of a defense by other means. Indeed, the defendant did not have to testify as to the conversation he had had with his two sets of attorneys. The attorneys themselves could have been called. That the good

faith of a defendant can be proven by his dealings with a professional is well established, or in order not to destroy any privileges that existed between Mitchell and his attorneys, trial counsel could have and should have called as a witness the Internal Revenue Agents with whom William Werner, Esq., had been negotiating. A proper examination of these witnesses could have demonstrated the good faith efforts that the taxpayer had made in regards to attempting to arrange for the disposition of his tax problems:

"Willfulness is an essential element of the offense charged. The defendant may not only testify that he had no such purpose but he may also, within reasonable limits, support his statement with testimony of relevant circumstances, including conversations had with third persons or statements made by them." Petesen v. United States, 268 F.2d 87, 89, (10th Cir. 1959), In accord, Miller v. United States, 120 F.2d 969, 970, (10th Cir. 1941).

Applying these rules to the facts herein, William Werner, Esq., Susan Hall or Robert Adelman could have testified at the trial if afforded the opportunity, as to Mitchell's tax arrangements. Nor is this possibility as to what a witness may have testified if he had been called to testify a matter which cannot be pursued on review. Indeed, it has been firmly established that, "the decision to call a witness is not... one totally immune from review. The failure to investigate or call

a particular witness surely may amount to ineffectiveness of counsel in certain circumstances." United States v. Thompson, 475 F.2d 931 (4th Cir. 1973)

As this scheme or text in Thompson, supra is laid out, it is not important that the attorney's failure to call a witness is due to the neglect or intent of the attorney. Instead, the focus of the inquiry is upon the effect such a default has upon the defendant's case. A defendant need only show that "there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense..." Bruce v. United States, 379 F.2d 113, 116-17 (4th Cir. 1967).

Applying these general principles of law to the facts in this case, unequivocally demonstrates that the taxpayer, could not, as a matter of law, be convicted if the proper and necessary defense witnesses were presented. Trial counsel's failure to call these witnesses in and of itself is sufficient to hold that his representation of the taxpayer at the time of the trial was ineffective.

The obvious parallel to trial counsel's failure to call these witnesses is presented in the situation, where a defense attorney knows of the existence of an alibi witness, whose availability is apparent, but consciously fails to call him or (her). This failure is the basis for a claim of ineffective counsel. Cambell v. United States, 377 F.2d 135 (4th cir. 1966) In Cambell, supra, the court stated, in remanding the case,

that:

"On the record before us we cannot make an appraisal of whether trial counsel's action in failing to call the alleged alibi witnesses was a tactical decision based, for example, on a judgment that their credibility might be impeached successfully, or whether there was a failure on the part of trial counsel to explore the matter fully. We make no assumptions on the answer to this question. If the former is the case, we would not disturb the action of the District Court; but if there was in fact a failure to make inquiry as to these witnesses, Appellant's counsel on the motion for a new trial had a clear duty to bring that fact to the attention of the Court. That this would require calling trial counsel as a witness and perhaps open him to the possibility of embarrassment is beside the point. Apart from the impact on Appellant's possible right to a new trial, once the suggestion of ineffectiveness is raised, Appellant's original trial counsel is entitled to an opportunity to meet the implied charge.

We recognize that the inquiry on remand may well prove fruitless as far as Appellant is concerned. The purpose of the remand is to bring out relevant facts not previously presented to the District Judge, so that he can make a fully informed decision. Although at the time of the hearing on Appellant's motion for a new trial no one claimed that trial counsel had been ineffective, Appellant's counsel in this Court has now, inadvertently or otherwise, raised questions on this score, which must be answered."

Jackson v. United States, 371 F.2d 960 (C.A. D.C. 1966) reaffirmed the sound judicial policy set forth in Campbell v. United States (supra). On a motion for a new trial, based upon the grounds of ineffective counsel, there was an

annexed affidavit of an eye witness who did not testify at the trial, but who would have definitely influenced the outcome, if she had.

The affidavit held in part on 961 and 962 that:

I had indicated to Mr. Jackson's attorney at the time ... that I ... would be available as a defense witness ... Mr. Jackson then told me that his (then) attorney ... had repeatedly assured him (Mr. Jackson) that he (the attorney) would make sure I appeared as a witness.

In passing upon this evidence, the Court held, at 962, that:

We hold that the record in the present case, as in Campbell, must be remanded to the District Court so that it may be supplemented by the testimony of witnesses, including original trial counsel, to the end that the District Court may take such action as it deems proper in the light of the testimony.

As Jackson's trial counsel assured him, James Mitchell, the within defendant, too was assured by his trial counsel that his (Mitchell's) prior good faith and non-willful actions in respect to his taxes would be set forth at the trial and would go a long way towards exonerating him. This was never done, although it could have readily been accomplished through the direct examination of Susan Hall, Robert Adelman, William Werner, Esq. or the Internal Revenue Agents.

The key aspect of this point is that this failure to call the witnesses was not a trial strategy as Judge Owen

believed (547 T) but rather a preconceived plan designed and implemented to protect the reputation of an associate. Assuming Arguendo, for the purposes of this appeal that this conduct was a trial strategy, the mere fact that these defense witnesses were not called amounts to ineffectiveness of counsel. See United States v. Thompson, supra.

When Justice Owen did take the evidence presented into consideration, he held that it was irrelevant any way because it did not take place in the taxable year of 1971 the year in which the taxpayer was indicted for evasion. (p. 546 transcript)

The glaring error of such an abuse of discretion is twofold.

First, the previously mentioned case law has demonstrated that good faith may be manifested after the tax payment in question is due. See Hayes v. United States, supra. In addition corporations are often formed after money has been received. Whether this was the case herein remains to be seen. Nonetheless, this evidence cannot simply be dismissed as irrelevant.

Second, Judge Owen, permitted the entire prosecution's case of willfulness under 18 U.S.C. 7201 to rest upon the introduction of evidence which occurred in the years 1970-1973. (See Point II) To grant this privilege to one side to demonstrate willfulness and deny it to the other to demonstrate good faith constitutes an abuse of discretion and reversible error.

V. THE NEWLY DISCOVERED EVIDENCE WOULD PROBABLY
PRODUCE AN ACQUITTAL ON A NEW TRIAL

There can be no question but that if the taxpayer was not thwarted by his trial counsel's plan and had the opportunity to prove the facts herein contained on a retrial of the whole case, the government would be unable to prove the mens rea for these crimes. Indeed, defendant's new evidence goes directly to the heart of this matter and stands in contradistinction to the case established by the prosecutor.

The petitioner herein does not contend that this court must "sit to second guess strategic and tactical choices made by trial counsel." United States v. DeCoster, 487 F.2d 1197, 1201 (4th cir.1973) and see Record at 547. Nor does petitioner attack a mere mistake of judgment or of policy by his trial attorney. Id. Petitioner's ultimate concern is with the fact that his attorney's utter failure to even consider presenting the innumerable defenses to the crimes with which he has been charged. The result of this ~~has~~ been to deprive Mitchell of his Sixth Amendment right to be represented by counsel; "The effective assistance of counsel is a defendant's most fundamental right for it affects his ability to assist any other right he may have." DeCoster, 487 F.2d at 1201.

The petitioner has established a substantial violation of his constitutional rights and that the prejudice resulting therefrom has "deprived him of a full adversary trial." Id. at 1204.

On a new trial evidence of a most compelling nature will be presented.

Assuming arguendo that Nancy Sauer did give Mitchell \$10,000.00 it is submitted that it was error for the trial court to presume that this income had to be reported. On page 31 of her grand jury testimony Sauer testified Mitchell paid for her limousine from the airport to New York City. On page 42 the following testimony took place. The questions were being propounded by Charles Padgett, Esq.

Q. Did you borrow money in New York?

A. Yes, from James Mitchell.

Q. How much money did you borrow from James Mitchell?

A. Whenever I needed it.

Q. He, out of the goodness of his heart, gave it to you, right?

A. Yes.

In addition to loaning Sauer money, Mitchell supported her by providing her food and clothing and shelter for a period of some two to three months. See grand jury testimony p. 46.

Accordingly, the \$10,000.00 or some portion thereof, was the repayment of a loan and expenses furnished to her. The repayment of a loan does not fall within the proscriptions of income that must be reported pursuant to IRC Section 61

H. J. Moravec Sp. 30 TCM 601, Dec. 30, 828 (M) TC Memo 1971-140
It was error for the court not to ascertain what portion of the alleged \$10,000 was the repayment of a loan if indeed it was

not the entire sum.

At this posture, the appellate court has no choice but to either remand this case back to the trial court for a full hearing upon the merits of petitioner's contention in accord with the provisions of FRCP 33, 18 U.S.C.A., or in the alternative "the court may grant a new trial to a defendant if required in the interest of justice." FRCP 33.

POINT II.

THE GOVERNMENT FAILED TO PROVE THEIR CASE
BEYOND A REASONABLE DOUBT.

In a criminal prosecution, the guilt of the defendant must be established beyond a reasonable doubt. Holt v. United States 218 U.S. 245.

As will be conclusively and unequivocally demonstrated herein, the prosecution has utterly failed to carry this specific burden. For the purposes of this argument, the two major aspects of this point may be further divided into the following two subheadings:

FIRST: The testimony of NANCY SAUER, an admitted prostitute and felon, cannot, as a matter of law or fact, be believed, and therefore, the finder of fact committed reversible error in basing appellant's conviction upon her testimony.

SECOND: The prosecution failed to prove the necessary wilful intent necessary to sustain a criminal conviction under 18 U.S.C. 7201 and 18 U.S.C. 7203.

The facts as presented in the transcript demonstrate that the prosecution's entire case rested on the testimony of one Nancy Sauer, who testified that she gave Mitchell \$10,000. It is submitted that the testimony of Nancy Sauer was discredited in such a manner as to render her testimony unbeliev-

able, as a matter of law and fact. This testimony was discredited by the defense's proof that the witness had a number of convictions outstanding against her, was biased and interested, and had committed prior and present bad acts. In addition, the witness' testimony demonstrates that she had committed prior inconsistent statements made under oath.

Although the credibility of a witness is generally not reviewable upon appeal, there is substantial case law demonstrating that appellate courts have the power to, and often do, as a matter of fact, reverse trial courts on findings of fact. The ratio dendi for reversing in these cases is that where the testimony of a witness is "tainted", the dignity of the United States government will not permit the conviction, based upon such testimony, to stand. Mesarosh v. United States, 352 U.S. 1, 9 (1956). And, where a finding by a judge is "clearly erroneous", it may be set aside. Davis v. United States, 328 U.S. 582, 593-94 (1946); United States v. Abel, 258 F.2d 485, 494 (2d Cir.), aff'd 362 U.S. 217 (1958). While it is for the trier of facts to determine whether there is guilt beyond a reasonable doubt, the reviewing court has the duty of insuring that the evidence is of such substance as to allow such choice. United States v. Ellicott, 336 F.2d 868, 871 (4th Cir. 1964). If there is no substantial evidence to support a finding of guilty, it should be overturned. United States v. Schechter, 475 F.2d 1099, 1101 (5th Cir. 1973).

The reason that Nancy Sauer was forced to lie and

assist the prosecution's efforts was due to the fact that she herself was subject to indictment on several grounds. By her testimony, she admitted to being a prostitute and earning many thousands of dollars upon which she had paid no income tax. In addition, she was in the United States illegally and subject to deportation. It is clear from the trial transcript that the government coerced her testimony by either threatening to prosecute her, or by promising not to.

These circumstances demonstrate the patent interest and bias that Nancy Sauer had, while testifying.

As further evidence of her lack of credibility, it was demonstrated that the witness had an extensive record of convictions, both in Canada and the United States. To what extent might a person who has had a taste of confinement go to avoid being sent to jail again? Of course, Miss Sauer has not been arrested subsequent to her agreement to testify. She had even been escorted home from Mr. Padgett's office on one occasion by police officers. Clearly, the witness was not a person evidencing a strong respect for the moral values of our society, such as integrity, and she had very strong motives to lie.

Although the aforementioned material could in and of itself be sufficient to demonstrate the unbelievability of Nancy Sauer's testimony, the fact that she continually lied and contradicted herself under oath demands that her entire testimony be dismissed as unbelievable. There was a contra-

diction about whether she had ever worked as a cashier. See trial transcript, pp. 234-35. She lied about job references to obtain an apartment. Transcript p. 193. She used many false names in her everyday life and when she was arrested. On page 214 of the trial transcript, when asked why she gave false names, she replied: "They asked me for a name. I gave them a name." There was a contradiction about whether she flew from Canada to the United States alone or with the appellant, (transcript p. 249); a contradiction about whether the appellant ever gave the witness one thousand dollars, (transcript p. 259); etc. The witness comes right out and admits that she lies on page 213 of the trial transcript:

Q. Do you have any moral qualms about using difference names?

A. No.

Q. Do you feel it's wrong to lie?

A. I don't lie.

Q. You don't lie?

A. I think it's wrong to lie, yes. It is very wrong. It is very wrong to lie.

Q. And you never lie?

A. Oh, yes, of course I do.

The scope of these lies and inaccuracies is such as to suggest that not only are the witness' allegations unbelievable, as a matter of law, but the witness lacks competency to testify because she does not truly understand when she is lying. The

witness' lack of intelligence is apparent throughout the pages of the transcript. She does not know the definition of the word "capacity" (pp. 111, 112, 129), and she thinks the fifth amendment enables her not to say anything which "discriminates" against her (;. 113). In view of the fact that the witness refuses to admit she is lying, when very obviously she is lying, had the effect of casting a burden upon the trial judge to ascertain that her affirmation to tell the truth was meaningful.

The witness' statements about quantities of money and periods of time are especially unbelievable, and it was reversible error for the trial judge to give them credence. On page 126 of the trial transcript, the witness alleges she stayed with the appellant for about two months, but at page 130, she thinks three months will sound better. On page 121 of the transcript, the witness testified that she arrived in New York "about May 20th, May 23rd". As to her response of what day of the week this was, she stated : "Well, we got here on a Tuesday" (page 121). A simple calendar check reveals that neither of these two aforementioned days is a Tuesday. Rather, they are a Thursday and Sunday respectively.

Although the prosecution may attempt to dismiss this discrepancy as unimportant, the totality of these blatant contradictions demand that Nancy Sauer's testimony be dismissed, in its entirety, as unbelievable.

At page 128, the witness states that appellant gave her ten or twenty dollars a day for expenses. There is a one hundred

per cent discrepancy between ten dollars a day and twenty. The witness evidences a continual propensity to exaggerate. At page 186, she returned to Canada 5 or 6 times since 1971. But at page 187, it is 6 or 7 times. With what ease do the facts and figures roll forth. But how can they be believed? She has no compunction about lying. When they ask her for a name, she gives them a name. And when they ask her for a number, she gives them a number.

The number she gave was ten thousand dollars. Yet, there is nothing substantial upon which to check the accuracy of this figure. There is contradictory testimony as to whether the witness allegedly worked for the appellant two months or three, six nights a week or seven. The witness' earning power supposedly varies with the season. There is no doubt that the witness' allegation of ten thousand dollars is mere conjecture. On page 130 of the trial transcript, in response to a request for an estimate of how much she made for the appellant, the witness responds: "Well, about \$10,000, I guess." (emphasis added). To reiterate, this evidence is not substantial enough to support a finding of guilty. See the Ellicott and Schechter cases cited above.

It is true that the prosecution does not have to prove exactly how much money an individual has made in cases of tax evasion. But the figure has to be believable; it cannot be incredible or mere conjecture, as we have here. The govern-

ment need not produce direct evidence of guilty intent, but may establish wilful violation by circumstantial evidence alone. United States v. MacLeod, 436 F.2d 947 (8th Cir.) cert. denied, 402 U.S. 907 (1971). But what is circumstantial evidence but evidence of a collateral fact which tends to prove the existence of the fact in issue? The fact in issue is whether the appellant had income in an amount requiring tax to be paid. But Sauer's testimony is not circumstantial evidence of the appellant's income. It is direct testimony. It does not pertain to collateral facts, but to the fact in issue. So it cannot be said that even if the figure of ten thousand dollars is so unbelievable as to be unbelievable as a matter of law, then at least it can be used as circumstantial evidence to show that it must have been at least seven hundred or seventeen hundred dollars, or however much is necessary for tax liability. It cannot be used in this way. Demonstrating the incredibility of Sauer's assertion of ten thousand dollars necessitates reversal.

The only way the trial court could have believed the witness' testimony was by a process of rationalization, as opposed to ratiocination. The judge must have rationalized: the defendant is a pimp and the witness is a prostitute, therefore, the pimp must have had some sort of taxable income even though the figure of ten thousand dollars is pure conjecture. But this is an impermissible inference. The conjecture of ten thousand dollars, offered as direct evidence of taxable income, cannot be used circumstantially to infer the existence of tax-

able income. If the prosecution had offered Sauer's testimony as proof that the appellant is a pimp and had then taken the effort to offer other circumstantial evidence of income, such as by the net worth method, then such an inference would have been permissible. But the evidence the prosecutor saw fit to supply to the court is inadequate for this purpose. As soon as the testimony of income received from the witness is accepted as being conjecture and an amount insupportable by any substantial evidence, then the rest of the evidence is inadequate, as a matter of law. And the witness herself acknowledges that her statement is only a "guess."

It is further submitted that the prosecution failed to prove beyond a reasonable doubt that Mitchell had the requisite wilful intent under 18 U.S.C. 7201, which calls for proof that the taxpayer failed to file his return with the specific intention of evading or defeating payment. United States v. Schiapani, 362 F.2d 825 (2d Cir.), cert. denied, 385 U.S.934 (1966) so as to demand a reversal.

The prosecution's grounds for proving wilfulness is presented on page 5 of the trial transcript where it is alleged the court will be able to infer wilfulness from the appellant's use of pseudonyms, the use of a corporate shell, and from the "use of a general pattern of evasiveness."

The first witness on the issue of intent was an agent of a landlord who testified that the lease of the apartment where the appellant resided in 1971 was signed by one Charles

Dunbar. But there was no testimony connecting the lease with the appellant to indicate that he had signed the lease using a pseudonym. The lease was improperly admitted into evidence under the business records exception to the hearsay rule. The lease was not being offered as hearsay, an out of court statement offered to prove the truth of the matter asserted, but as proof that the appellant had signed the lease using a pseudonym. It was necessary to properly authenticate the lease.

The policeman, Driscoll, testified that he had frequently addressed the appellant as Charles Dunbar but that on the one occasion he asked the appellant for identification, the appellant gave him his true name.

This certainly is not the conduct of one who is attempting to use a pseudonym. Rather, this act defeats the government's allegation that the appellant used a pseudonym for willful purposes.

A car dealer, named Moyal, testified that the appellant and an elderly woman traded in a used car for another used car, to be registered under the name of Donna Mitchell, and that the car was apparently used by the appellant. This Donna Mitchell is not a pseudonym or person fronting for the taxpayer but actually is the mother of James Mitchell, the within appellant.

From this, the prosecution expects the court to infer a general pattern of evasiveness or that the appellant also used the pseudonym Donna Mitchell. But this is not a conclusion which flows naturally from the evidence. There are many sons

who drive automobiles registered in the name of a parent, especially if the son is under 25 years old and insurance rates are very high. This is also a possible reason why the appellant was driving a car registered in the name of Donna Mitchell. And, where the evidence is as consistent with innocence as with guilt, and fails signally to show wilful intent, a court should not be willing to convict a defendant on such evidence as we have here. Candler v. United States, 146 F.2d 424, 426 (5th Cir. 1944).

The witness named Epstein brought index cards from a local bank which indicated that Charles Dunbar opened an account there. The prosecution made the point that the information about wife and children on the cards allegedly matches the correct information about the appellant. The cards were offered in evidence to prove the appellant possessed financial sophistication and had a pattern of evasiveness, and therefore intended to evade the income tax. But it was improper to admit these file cards. For the same reason it was improper to admit witness Ferguson's lease. These cards were admitted under an exception to the rule against hearsay, known as the business records exception. It is only applicable when the evidence is being offered as hearsay, an out of court statement offered to prove the truth of the matter asserted. Since the cards were being offered for another purpose, the exception is inapposite. The cards asserted that Charles Dunbar opened an account, but this is not the fact the cards were offered to prove. They were

offered to prove that the appellant, not one Charles Dunbar, opened these accounts. Therefore, the evidence was not properly authenticated, and admitting them was reversible error.

Assuming arguendo that these file cards and the lease were properly admitted, this evidence is still inadequate to establish the necessary measure of wilfulness under either of the aforementioned sections of the I.R.C. The evidence certainly does not establish the specific intent to violate the law made necessary by the language of Section 7201.

The government, through the use of innuendo, failed to conclusively demonstrate that the appellant and Charles Dunbar were the same person, or in the alternative, that the appellant was even holding himself out to be Charles Dunbar.

It is true that the government need not produce direct evidence of guilty intent, but may establish wilful violation by circumstantial evidence alone. United States v. MacLeod, 436 F.2d 947 (8th Cir.), cert. denied, 402 U.S. 907(1971). But, although a pattern of behavior, as distinguished from a single occurrence may itself suggest wilfulness, this is a far cry from holding that it inescapably establishes wilfulness. United States v. Palermo, 259 F.2d 872, 881 (3d Cir. 1958). The totality of circumstances just does not provide evidence sufficient to infer the requisite intent. The evidence is just as indicative of innocence as of guilt, of no wilfulness as of wilfulness. The burden was on

on the prosecution to prove intent beyond a reasonable doubt. They have failed to do it here. The appellant was conceded that no returns were filed. In the first sub-point of this issue, it is demonstrated that the evidence of income was inadequate, as a matter of law. But even if the income is established, then the conviction must still be reversed because the evidence simply does not establish, beyond a reasonable doubt, that it was the appellant's specific intent to evade the taxes, or that his conscious motive guiding his actions was to evade their payment.

To set forth to this court the general weakness of the prosecution's evidence and its lack of persuasiveness, it must be demonstrated that most of the evidence admitted against the appellant pertained not to 1971, the taxable year in issue, but to later or earlier years.

Nevertheless, the trial judge, in his discretion, determined that all of this evidence was relevant. The trial judge possesses wide latitude in determining relevancy. In Wilson v. United States, 250 F.2d 312, 325-26 (9th Cir. 1958), the issue was the admissibility of evidence concerning the defendant's state of mind. It was held that the trial judge did not abuse his discretion in that case by excluding evidence concerning actions over 3 years after the indictment. Of particular importance here is the fact that such evidence does raise an issue of relevancy. Therefore, it is weaker evidence than evidence of intent in the year in question would be.

To reiterate, where the evidence is just as consistent with innocence as with guilt, the convictions must be reversed. Candler, supra, at 426. As an example of this, I refer this court to the testimony of Attorney Pravda. His testimony is just as consistent with the taxpayer's innocence, as with guilt. It certainly may not be inferred, as a matter of course from the establishment of a corporation, that the purpose of the corporation is the wilful evasion of income taxes. In fact, just the contrary is the reasonable conclusion. The choice between setting up a business as a corporation or a sole proprietorship is frequently based on tax considerations, at least in part. This presupposes an intention to pay all taxes legally due to the government.

In conclusion, there is no clear proof of the appellant's intention. All the evidence is consistent with a desire to pay any taxes due.

There is no substantial evidence to support a verdict of guilty, and the trial judge's finding of fact was clearly erroneous. It has often been said that hard cases make bad law. Looking beyond the surface facts here, and the desirability of locking up all the pimps and throwing away the keys, what is the underlying issue here? It is whether an individual's conviction, which is based solely upon evidence which is patently incredible and unbelievable, as we have in this case, should be upheld. It is inconceivable that if a doctor or a businessman were the defendant, instead of a pimp, the trial judge would

have believed such flimsy evidence, or, indeed, that the prosecution would have rested its case upon such flimsy evidence. Upholding the verdict of guilty, on the facts of the case as shown by the record, would only serve to establish a pernicious precedent.

POINT III.

THE PERSONAL BIAS AND EXTRAJUDICIAL INFORMATION CONSIDERED BY THE TRIAL JUDGE IN REACHING HIS VERDICT AND SENTENCING JAMES MITCHELL, DENIED MITCHELL A FAIR TRIAL WITHIN THE DUE PROCESS STANDARDS OF OUR CONSTITUTION.

In a criminal case, when a defendant waives trial by jury and submits his rights and liberty to a judge, that judge is in the position of a jury. All the protective rules for the defendant's rights continue to apply with equal force. People v. Rivers, 410 Ill. 410, 102 N.E.2d 303 (1951); People v. Hoffman, 379 Ill. 318, 40 N.E.2d 515 (1941). There is prejudicial error if any unauthorized information reaches the jury or judge on a non-jury trial. People v. Rivers, supra, 102 N.E.2d at 308. The remarks of the Hon. Richard Owen, the trial judge, both in content and attitude, indicate there had been private investigation on his part. Upon reaching his verdict and sentencing (T 566-57) the judge undeniably appears to have proceeded under the influence of television and radio conversations the taxpayer had and "matters of this book," (The Gentleman of Leisure). when there is not a scintilla of direct evidence on the record as to these matters. (The judge admits to reading the book during the trial, T379.) The resulting bias and prejudice of the trial judge stemmed, therefore, from an extrajudicial source which led to the formation of an opinion, which was not based upon the merits of what the judge learned by his participation in the proceedings of United States v.

James Mitchell.

As a general proposition, due process of the law requires adjudication by an impartial judge. United States v. Meyer, 462 F.2d 827, on remand 346 F.Supp. 973 (4th Cir. 1972); United States ex re Bloeth v. Denno 313 F.2d 364 (2d Cir.) cert. denied Denno v. Bloeth 372 U.S. 978 (1963).

Prejudice, bias or other basic forms of predisposition on part of the trier of fact, results in a denial of due process. Crawford v. Bounds 395 F.2d 297 (4th Cir. 1968). This would encompass a fact-trier's reliance on "personal" knowledge, characterized by an attitude of extrajudicial origin, derived non coram iudice. (Wolfson v. Palmieri 396, F.2d 121 (2d Cir. 1968)).

The trial judge evidenced his determination of facts founded upon his own personal knowledge on a number of occasions. Most appalling was his reference to the CBS television show, and Jim Gash radio program. (p. 556 Transcript)

Repeatedly, the appellate courts have held that the trial judge has no right to make a determination upon his own knowledge, irrespective of the evidence. Reilly v. Wallace 188 Ky. 471, 222 S.W. 1085 (1920); State v. Armitage 167 La. 70, 118 So. 696 (1928); Gibson v. Von Glahn Hotel Co., 185 N.Y.S. 154 (Sup. Ct. 1920).

In State v. Armitage, the appellant had been convicted of having intoxicating liquors in his possession for sale. The trial judge erroneously refused to disregard his

own personal opinion and private knowledge and make a determination on the evidence submitted.

For, as stated in Reilly v. Wallace, supra, it matters not what is known to him judicially - "non refert quid notum sit judici si notum non sit in forma iudicis."

In Gibson v. Von Glahn Hotel, supra, a trial judge made a determination based on his own personal knowledge. The appellate court held this was reversible error.

See also Matter of Brommer, 159, Misc. 511, 288 N.Y.S. 419 (Surr. Ct. 1936) (when interpreting a statute he helped to draft, the trial judge was compelled to ignore what he personally knew.)

Judge Owen's statement, indicating that he considered matters not in evidence, rebuts any presumption that he considered admissible evidence only. Apparently, what the judge did consider, was Mitchell's alleged admission by silence on the aforementioned August 1973 program, his admission on the radio program, and "matters of this book." Parenthetically, the two program admissions were as to earnings in 1973, and not 1971.

The Illinois Supreme Court in People v. Wallenberg, 24 Ill. 2d 350, 181 N.E. 2d 143 (1962), reversed a robbery conviction on this precise ground, holding that the trial judge's determination "based upon a private investigation by the court or based upon private knowledge of the court, untested by cross-examination or any of the rules of evidence constitutes a denial of due process of the law." Id 181 N.E.2d

at 145.

People v. Thunberg, 412 Ill. 565, 107 N.E. 2d 843 ();
People v. Rivers, 410 Ill. 410, 102 N.E. 2d 303 (1951);
People v. Cooper, 398 Ill. 468, 75 N.E. 2d 885 (1947);
People v. McGeoghegan 325 Ill. 337, 156 N.E. 378 (1927)

Justice Owen's determination that Mitchell was guilty was based upon his personal feelings, a radio program, television programs and matters of a highly exaggerated book which was specifically excluded from evidence. This ^{non-judicial} evidence was not subject to cross-examination and the trial judge's use of it denied Mitchell of his constitutionally protected rights to due process of the law.

The within fact pattern is analogous to People v. Cooper, supra, wherein a murder conviction was reversed because the trial court had conducted non-judicial investigations into the character of certain witnesses and used those investigations when determining their credibility. The Illinois Supreme Court held that this was a denial of that defendant's right, to confront and cross-examine witnesses against her.

Here, Mitchell was denied the chance to rebut or explain information obtained by the judge, as to matters which were known to him through extrajudicial investigations, and the perusal of a book, whose cover was admitted into evidence, but whose content was specifically excluded. The consideration by the trial judge of any of this tainted information in his considerations, demands that the verdict be reversed.

It is a fundamental concept in the administration of

justice in the federal courts that it is not enough that an accused be guilty of the offense for which he is charged and convicted, but the accused must be tried and convicted according to proper legal standards and procedures, appropriate for criminal trials. He must be found guilty beyond a reasonable doubt by the sole consideration of evidence properly submitted to the tribunal. Wilson v. U.S. 250 F.2d 312 (9th Cir. 1950); Bollenback v. United States 326 U.S. 607, 614 (1946).

Where such error of improperly considered evidence has been shown, it is presumed to have injured the party against whom it was committed, unless the contrary affirmatively appears from the record. Gilmery v. Higley, 110 U.S. 47. Such is not the case here.

POINT IV.

THE FAILURE OF PATROLMAN DRISCOLL AND
INTERNAL REVENUE SERVICE AGENT CLARK
TO ADVISE MITCHELL OF HIS MIRANDA
RIGHTS WAS A VIOLATION OF HIS 14TH
AMENDMENT

The requirements of Miranda apply when a subject is taken "into custody" and is "questioned". The Miranda Court defined custodial interrogation as that "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona 384 U.S. 436, 444 (1966). (Emphasis supplied)

Two post Miranda decisions clearly illustrate what is meant by "custody". In Mathis v. United States 391 U.S. 1 (1968), the court held that an Internal Revenue Service agent should have given the Miranda warnings to the subject of a routine tax investigation. The inquiry may have been initiated for the purpose of civil action, not criminal prosecution, and to that extent differed from a murder, robbery or other such investigation. However, as Congress has so empowered the Internal Revenue Service, the investigation could possibly result in a criminal prosecution, and tax investigators were held not to be immune from Miranda requirements. Therefore, there is no distinction between an Internal Revenue Service agent and a police

officer. Miranda requires that warnings be given when a person being interrogated is "in custody at the stationhouse or otherwise deprived of his freedom of action in any way". Miranda, supra at 477. Generally, criminal tax investigations are devoid of anything implying custody. When the government's investigatory power, however, is directed specifically against the individual with the intent of developing evidence to convict him, it is essential that the individual be informed of his rights. When the agent Clark came to subpoena Janet Milanizak on September 27, 1973 and found James Mitchell in the apartment, he had a duty to give James Mitchell his Miranda rights as Mitchell had been under investigation since April of 1973. That the presence of Clark at Janet Milanizak's might have been coincidental with that of Mitchell is irrelevant. In Mathis, supra at 4, the government's contention that "in custody" means "in connection with the case under investigation" was rejected by the court, which underscored the clear and unequivocal language and intent of Miranda. Mitchell was confined to Janet Milanizak's apartment at the time of interrogation by Clark. (T 390). Mitchell was also confined to Officer Driscoll's apartment in November of 1972 on the night that he allegedly admitted to being a pimp. (T 30). On both occasions, Mitchell was not given his Miranda rights.

Both events are analogous to a second significant post Miranda decision, Orozco v. Texas, 394 U.S. 324 (1969). In that case, four policemen were admitted to the accused's bedroom by an unidentified woman at 4:00 A.M. The accused was asked if he had owned a gun and whether he'd been at a certain restaurant where there had been shooting the previous evening. Here, Clark interrupted the privacy of Mitchell and his friend, Janet Milanizak, on one occasion, startling Mitchell, so that he would be off-guard and feign filing tax returns in another state. Here, Police Officer Driscoll shows Mitchell his badge, "invites" him into his apartment, and allegedly illicitly an admission from Mitchell. In both instances Mitchell could reasonably apprehend that he was not free to terminate the interview. The subjective state of mind of the defendant was that he was "in custody". That the police investigation and Internal Revenue Service inquiries had focused on him is relevant. Most conclusive is the fact that Mitchell should have reasonably believed the investigation to be focused on him. Such evidence viewed with the surrounding factors, i.e., showing of the badge, tends to show he was not free. The fact that Mitchell was not covered by gunpoint but voluntarily entered the apartment of Officer Driscoll after seeing his badge, does not remove this from an out of an "in custody" situation.

McCormick, On Evidence, Section 152, p. 330 (2d Ed. West 1972) points out that the most appropriate approach for determining "interrogation" is to include any police action

that is either calculated or reasonably likely to evoke an incriminating testimonial response from the accused. Clark's interrogation of Mitchell, who was already "suspected" of a known crime, was for the purpose of determining his actual culpability. The emotional impact of the confrontation was such that Mitchell was not in a position to make a "knowing" and "intelligent" decision as to whether he should answer a question that later might turn out to have tremendous significance for him.

It is submitted that the questioning by Clark and Driscoll was under such circumstances that Mitchell reasonably concluded that his freedom of movement was restricted, and as he was suspect of committing a crime at the time, Miranda warnings need be given. Andrews v. Knowlton 367 F.Supp. 1263 (S.D.N.Y. 1973).

POINT V.

THE COMPELLED TESTIMONY OF SUSAN HALL
DENIED MITCHELL HIS FIRST AMENDMENT RIGHT
TO FREEDOM OF SPEECH AND ASSOCIATION, AND
THOSE RIGHTS AFFORDED HIM UNDER THE CIVIL
RIGHTS ACT OF NEW YORK 79-h.

"It is axiomatic and a principle fundamental to our constitutional way of life, that where the press remain free, so too will a people remain free." Baker v. F & F Investment Co., 470 F.2d 778, 785 (2d Cir. 1972). The condoning of the compelled testimony of Susan Hall cannot be tolerated, absent a concern so compelling, as to override the precious rights of freedom of speech, association and the press.

Susan Hall was compelled to testify, over objections by her counsel, as to the source of information. The prosecution never asked the question "who was your source". However, the questions put to Susan Hall (T p. 328 to 338) inquiring as to with whom did she enter into royalty agreements and to whom did she make payments, were paramount to the direct question "who was your source?"

Such questioning infringed not only on Susan Hall's first amendment and Civil Rights Act of New York 79-h privileges, but penalized James Mitchell for exercising his rights derived directly under the freedom of speech, and indirectly under the New York Civil Rights Act 79-h.

The First Amendment cannot be infringed upon absent a "compelling" or "paramount" state interest (NAACP v. Button 371 U.S. 415 (1963)) such as the securing of the "safety of the

person and the property of the citizen". The testimony of Susan Hall was not necessary for either of these limited exceptions. No person's safety or property would be jeopardized by the absence of her testimony. It would have merely necessitated another approach by the prosecution in attempting to prove that James Mitchell received \$1,000 income in 1971, in his individual capacity, which he failed to report and pay taxes on. Of tangential relevance to this case is People v. Wolf, 39 A.D. 2d 864, 333 N.Y.S. 2d 299 (1st Dept. 1972) in which a newspaper and editor unsuccessfully appealed from the denial of an order to quash a subpoena duces tecum which demanded an original manuscript of an article containing a purported confession. The Supreme Court's Appellate Division there found that the subpoena merely sought production of what was clearly attributable to a specific individual who had signed the manuscript. As there had been no "cloak of confidentiality" in that case, there was no need for privilege. However, there was a definite "cloak of confidentiality" in this case, as evidenced by the fact that Susan Hall never named James Mitchell in her book in any capacity.

A condoning of the trial courts compelling Susan Hall's testimony would have a chilling effect upon future dissemination of news. Circuit Judge Irving R. Kaufman, in the opinion for Baker v. F & F Investment Co., 470 F.2d 778 (2d Cir. 1972) held that First Amendment rights would not be yielded to compel disclosure by a journalist of her confidential

news sources, where disclosure was not essential to protect public interest in the orderly administration of justice, and disclosure did not go to the core of the prosecutor's case. Baker was a federal class action under the Civil Rights Act involving alleged discrimination in the sale of houses to Negroes in Chicago. The plaintiffs in Baker moved for an order compelling disclosure of a journalist's confidential sources. The court pointed out that there was no federal law recognizing an absolute or conditional testimonial privilege, and therefore looked to the state where the events took place (Illinois) and where it was sitting (New York). Id. The trial judge in Mitchell's case disregarded N.Y.Civ.Rights Law (T 157). Pointing out that New York's law, as did Illinois', reflected a paramount public interest in the capability of the press to independently investigate, the court stated that "compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information on a confidential basis." Succinctly phrased, the consequential deterrent effect upon future undercover reporting "threatens freedom of the press and the public's need to be informed. It undermines values which traditionally have been protected by federal courts applying federal public policy." Id. at 782. See Blackmer v. United States, 284 U.S. 421 (1932).

Newsgatherers such as Susan Hall must not be hindered in their attempt to inform the public, and informants such as James Mitchell, must not have their lips sealed by fear of

exposure and prosecution.

Even in Branzberg v. Hayes, 408 U.S. 665 (1971) where the state's paramount interest in securing the safety of person and property was held to be an overriding interest, such that a journalist was required to disclose confidential sources to a grand jury investigating criminal activity, caveats were entertained.

Mr. Justice Powell, in his separate concurring opinion, emphasized the very limited nature of the court's holding. He noted that when First Amendment values conflict with the duty of a journalist to testify, courts must be wary, for the public interest in non-disclosure of confidential news sources will most often be more persuasive than the interest in compelled disclosure. Id. at 709-710.

We contend that this is such a case, that Susan Hall's testimony inculcating Mitchell was erroneously received and therefore, Mitchell is entitled to a reversal of his conviction, or a new trial.



CONCLUSION

For the reasons set forth herein, the decision entered in this matter should, as a matter of law and fact, be reversed in its entirety, or in the alternative, this Court should grant a new trial unto the within appellant, pursuant to the relief requested in the Rule 33 application, or in the alternative, grant unto the appellant a hearing to determine whether a new trial should be granted, pursuant to the Rule 33 application.

Respectfully submitted,

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